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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Docket No. 71-626

PHILIP E. GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinion Below

The only opinion below is that of the Third Circuit, appended hereto. It as as yet unreported.

Statement of Jurisdiction

The date and time of entry of the judgment of the Third Circuit, here sought to be reviewed, is September 23, 1971.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254.

Questions Presented for Review

1. Was the evidence below sufficient to prove that petitioner had knowledge of any conspiracy whose purpose was that money was to be obtained by the wrongful use of fear?

2. Was the evidence below sufficient to prove that petitioner obtained money from Rigo by inducing in Rigo fear of financial injury?

2a. Was Petitioner criminally liable for extortion if, unknown to him, someone else had induced fear in Rigo?

3. Did not the trial judge commit reversible error in declining to charge the jury on the distinction between bribery and extortion?

Statute Involved

18 U. S. C. A., Section 1951, the Hobbs Act, (Interference with commerce by threats of violence), provides, in part:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined

not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section— • • •

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term "commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Statement of the Case

This petitioner, Philip E. Gordon, was brought to trial and convicted under an indictment for extortion, and conspiring to extort, in violation of 18 U. S. C. A., Section 1951.

The indictment was in 66 counts (R251a to 382a).

The first count charged that Gordon and 14 other defendants

"did wilfully, unlawfully and feloniously conspire with each other, and with other persons to the grand jury unknown, to obstruct, delay, and affect interstate comerce, as that term is defined in Section

1951 of Title 18, United States Code, and the movement of materials, equipment, supplies, and labor in such commerce by extortion, as extortion is defined in said section of the United States Code; that is to say, that the defendants did conspire to delay, to obstruct, to impede and to thwart construction undertaken on behalf of the City of Newark, the contractors performing such work and the timely and usual movement of supplies and materials needed to complete such projects, in order to obtain the property of contractors, engineers and others working on said municipal construction pursuant to such contracts with the consent of such companies, their officers and their agents, said consent having been induced both by fear of financial injury and under color of official right."

Counts II through X charge (inter alia) that the defendants obtained varying amounts

> "in United States currency from Constrad, Inc. (which was engaged in performing engineering and consulting services for the City of Newark on various municipal projects), its officers and its agents, with the consent of Constrad, Inc., its officers and its agents, such consent having been induced both by the wrongful use of fear of financial injury and under color of official right."

Counts XI through LXVI charge the defendants with similarly obtaining varying amounts from Constrad, except that in these counts it is alleged that the defendants obtained each of the amounts through one of the defendants, mentioned by name varying in each such counts, as follows:

Count Number	*Amount in Thousands*	*Defendant*
XI	5	La Morte
XII	1	Bernstein
XIII	1	F. Addonizio
XIV	1	West
XV	0.5	Turner
XVI	0.5	Callaghan
XVII	0.5	Gordon
XVIII	0.5	Giuliano
XIX	0.5	Bernstein
XX	0.5	F. Addonizio
XXI	1	Gordon
XXII	1	Schiff
XXIII	1	West
XXIV	1	Bernstein
XXV	5	La Morte
XXVI	1	F. Addonizio
XXVII	1	Turner
XXVIII	1	Callaghan
XXIX	1	Gordon
XXX	1	Giuliano
XXXI	2	H. Addonizio
XXXII	10	Vicaro

Count Number	*Amount in Thousands*	*Defendant*
XXXIII	5	La Morte
XXXIV	1	West
XXXV	1	Bernstein
XXXVI	1	F. Addonizio
XXXVII	1	Turner
XXXVIII	1	Callaghan
XXXIX	1	Gordon
XXXX	1	Giuliano
XXXXI	1	H. Addonizio
XXXXII	5	La Morte
XXXXIII	1	West
XXXXIV	1	Bernstein
XXXXV	1	F. Addonizio
XXXXVI	1	Turner
XXXXVII	1	Callaghan
XXXXVIII	1	Gordon
XXXXIX	1	Giuliano
L	10	Vicaro
LI	5	Callaghan
LII	5	La Morte
LIII	1	West
LIV	1	Bernstein

Count Number	*Amount in Thousands*	*Defendant*
LV	1	F. Addonizio
LVI	1	Turner
LVII	0.5	Callaghan
LVIII	1	Gordon
LIX	1	Giuliano
LX	10	Vicaro
LXI	1	West
LXII	1	La Morte
LXIII	1	Gordon
LXIV	1	H. Addonizio
LXV	4	Krusch
LXVI	4	Krusch

The following are *all* of the portions of the testimony below on the Government's case, either naming or including Gordon as having anything to do with the offenses charged against him:

The Government witness, Irving Kantor, on cross-examination, testified (R1621a):

> "Q. With respect to any of the transactions that you have testified to for the past several days, did you ever talk with, or meet with, or have any contact whatsoever with Phillip Gordon? A. None at all."

The Government's witness, Paul W. Rigo, referring to a conversation by him with the defendant, Anthony Boiardo (R2613a), on a Sunday between March 8 and March 26 (R2608a), 1965 (R2604a), testified (R2611a):

> "I said, 'We can't pay you 10%.' I said, 'What are we getting for paying you 10%?' He said, 'There is a lot of mouths to feed in City Hall,' he said 'You pay me the 10%.' He said, 'I take care of the Mayor. I take care of the Council. I take care of anybody else that has to be taken care of down there.'"

Rigo further testified, referring to a conversation by him with the defendant, Anthony La Morte, toward the end of 1967 (R2903a), that the latter told Rigo that

> "Mr. Boiardo was desirous of me (Rigo) making these payments directly to these officials, that the price was $10,000 apiece to each of eight Councilmen and the Mayor * * *"

Rigo further testified (R2905a):

> "Q. At the time you had this conversation with the defendant La Morte was the defendant Gordon on the Council? A. Yes, sir.
>
> "Q. And was Anthony Giuliano on the Council at that time? A. I think so, sir, yes."

He further testified (R2906a):

> "Q. Did you ultimately make payments to Councilmen after that conversation with the defendant La Morte? A. Yes, sir, I did."

He further testified that in a February 15, 1968 entry in his diary (R2925a)*

> "The P plus a half indicates $500 to Phil Gordon."

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* In its opinion (appendix hereto, page 4a, line 6), the court below mentions "*Gordon's* diary entries." This was an inadvertence. There were no diary entries of Gordon. *Rigo's* diary entries were the ones meant.

He further testified (R2925a, 2926a):

"Q. Can you recall whether or not you gave Councilman Giuliano his money directly? A. No, sir, I never gave it to Councilman Giuliano (R2629a) directly.

"Q. Who did you give Councilman Giuliano's money to? A. Mr. Gordon.

"Q. Was there any understanding between you and Mr. Gordon? A. Yes, sir.

"Q. What was that understanding? A. That he would pick up Mr. Giuliano's money."

He further testified that in another February 15, 1968 entry in his diary (R2927a)

"• • • The P plus 1 was, again, Mr. Gordon, a thousand dollars."

He further testified (R2937a) that, on March 22

"• • • I paid a thousand dollars each to each of the Councilmen involved."

He further testified (R2939a):

"• • • I gave Mr. Giuliano's to Mr. Gordon.

"Q. With any understanding between you? A. Yes, sir.

"Q. What was that understanding? A. • • • Mr. Giuliano's share would be forwarded to him by Mr. Gordon."

He further testified (R2939a, 2940a):

"Q. Now on March 24, you have an entry, Nassau-Phil-(2940a) • • •

"• • • A. I was going to Nassau that day with Mr. Gordon and his son.

"Q. Did Mr. Gordon and his son fly down with you? A. Yes, sir.

"Q. Who paid for Mr. Gordon and his son's trip? A. I did, sir.

"Q. Did Mr. Gordon ever pay you back? A. No, sir."

He further testified that on April 4th, he gave 2 envelopes containing $1,000 each to Gordon, with the understanding that the latter was going to give "the other thousand" to Giuliano (R2950a, 1951a).

He further testified that, on April 8, 1969, Gordon was sworn in as corporation counsel, on Mayor Addonizio's appointment. Prior to that, Gordon was a councilman (R2956a, 1957a).

He further testified that in a May 10, 1968 entry in his diary (R2960a)

"• • • The '8 C plus 1' indicates a thousand dollars to each of the eight Councilmen."

That included payments to Gordon and Giuliano, notwithstanding that neither was a councilman any longer. Mayor Addonizio had appointed Giuliano a judge (R2961a).

He further testified that on the May 10th occasion (R2965a, 2966a)

"• • • I gave him (Gordon) a thousand dollars for himself and a thousand dollars for Mr. Giuliano.

"Q. Do you recall whether or not these moneys were in envelopes? A. Yes, sir, they were.

"Q. Do you recall how many envelopes you gave to (2966a) the defendant Gordon? A. Two, sir.

"Q. Was there any understanding between yourself and the defendant Gordon? A. Yes, sir.

"Q. What was that understanding? A. That he would deliver the money to Mr. Giuliano."

He further testified (R2968a):

"Q. In regard to the defendant Gordon, you have told us that he advised you that he was delivering the money to Councilman Giuliano, is that so? A. Yes, sir.

"Q. Do you have any way of your own personal knowledge of knowing whether he actually delivered the money or not? A. No, sir.

"Q. But is that what he told you? A. Yes, sir."

He further testified that in a June 12th entry in his diary (R2977a, 2978a)

"• • • The 7 plus 1 indicates seven Councilmen received a thousand dollars each. • • •

"Q. What do you mean by that? A. The seven who were Councilmen when this thing began."

And (R2980a, 2981a):

"Q. Did you make a payment to the defendant Gordon? (2981a) A. Yes, sir, I did.

"Q. On that date? A. Mr. Stern, I am not positive whether I gave it to him that day or whether I sent it down to his office that day. I am not clear.

"Q. Did you either, when you gave it to him or sent it to his office, send anything or give anything with it? A. Yes, sir.

"Q. What, if anything, did you give with it? A. The payment for Mr. Giuliano.

"Q. Why did you do that? A. That has been the arrangement.

"Q. What arrangement? A. The arrangement with Mr. Gordon and that he would forward it to Mr. Giuliano."

He further testified that sometime after January 13, 1969, he paid Gordon $1,000 (R2989a).

At the end of his direct examination, the following transpired (R3044a, 3045a):

"Mr. Stern (Assistant District Attorney):

"I have in my hand a certified copy of the transcript of the appearance of the defendant Phillip Gordon before the United States Grand Jury on December 9, 1969. * * *

"(3045a) (Exhibit G-2000 received and marked in evidence.)

"Mr. Stern: May I read it to the jury?

"The Court: Yes, Mr. Stern.

" 'The Witness: Phillip E. Gordon, 60 Pacific Street, Newark, New Jersey.' "

And (R3048a to 3054a):

" 'Q. Now, Mr. Gordon, you are an attorney, you say. Are you also a public official of the City of Newark? A. Yes, sir. I am the Corporation Counsel of the City of Newark.

" 'Q. And how long have you served in the capacity of Corporation Counsel? A. Since April 8, 1969. Prior to that I was a Councilman, from 1954 to the day I became Corporation Counsel.

"'Q. So, if I understand your testimony correctly, (3049a) from 1954 until 1958* when you became Corporation Counsel you were a Councilman of the City of Newark, is that correct? A. That is correct, sir.

"'Q. Now, directing your attention to the contracts which were let for the Water Authority jobs—do you know what I am talking about? A. Yes, sir.

"'Q. Directing your attention to those contracts, did you in connection with those contracts receive any money from a Mr. Paul Rigo? A. Yes, sir.

"'Q. On how many occasions did you receive money from Mr. Rigo? A. On two occasions, $2,000 each time.

"'Q. Now, then, on each occasion who gave you the money? A. Mr. Rigo.

"'Q. And on each occasion how did he give the money to you? A. In an envelope, a plain envelope.

"'Q. Mr. Gordon, did you understand at the time you took that money that what you were doing was wrong, illegal and immoral? A. It was wrong legally, morally and any way you want (3050a) to put it, it was wrong.

"'Q. Did you receive those payments of money, $2,000 each from Mr. Rigc in the year 1968? A. Yes, sir.

"'Q. Mr. Gordon, I show you a document which has been marked Grand Jury Exhibit 2. It is a photostatic copy of a tax return. Can you tell us, sir, whose tax return that is a photostatic copy of? A. It is the joint return of myself and my wife, Pearl B. Gordon.

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* Should be 1968.

"'Q. Is that for the year 1968? A. Yes, sir.

"'Q. Do you find anywhere reflected in that tax return the reporting by you of $4,000 in cash received from Paul Rigo? A. No, sir.

"'Q. Did you report it on your returns? A. No, sir.

"'Q. Why didn't you? A. It was illegal moneys; I just didn't do it.

"'Q. You didn't want to disclose it, is that it? A. That is correct.

"(3501a) Mr. Stern: 'Now, then, Mr. Gordon, let me bring you back to the first time that you ever received cash in an envelope from Paul Rigo. At that occasion did Mr. Rigo give you only one envelope or did he give you two? A. He gave me two.

"'Q. And what, if anything, did he tell you in reference to the second envelope? A. That I should give it to now Judge Anthony Giuliano.

"'Q. To the man who is now Judge Giuliano? A. That is correct.

"'Q. At the time you received the envelope from Rigo, what position, if any, did Giuliano hold? A. I don't know if this occurred when both of us were Councilmen or after I became Corporation Counsel and he became a Judge. I don't recall the time. All is know is it happened.

"'Q. Was it in the period of time in which Giuliano was a Councilman or roughly in the period of time when Giuliano was a Councilman? A. It could have been. I don't know the exact time. I can't pinpoint it.

"Q. Now, was there any difference between the envelope that he gave you for yourself and the en-

velope which he gave you for Giuliano? (3052a) A. No, sir.

"'Q. Were there any names on the envelopes? A. No, sir.

"'Q. They were indistinguishable one from the other, is that right? A. That is correct, sir.

"'Q. Do you know ultimately whether you opened the one marked for you or the one marked for Giuliano? A. Well, there were no markings on them, sir.

"'Q. So you mixed them up together, is that right? A. That's right.

"'Q. Ultimately, what, if anything, did you do with the envelope which Rigo had given you for Giuliano? A. I called Mr. Giuliano; if I recall correctly, he came to my office and I gave it to him. • • •

"'The Witness: I called him and asked him to come to my office and I then gave him the envelope and said, "Paul Rigo asked me to give you this."

"'Q. Did you tell him on the telephone what you wanted to do with him in your office? A. No, sir.

"'Q. Why didn't you? A. Because I didn't feel it was a subject of a telephone conversation.

"(3053a) 'Q. And in your office you gave him the first envelope and you told him, as you told me, it was from Paul Rigo, is that right? • • • A. yes, that it was from Paul Rigo; Paul Rigo had given it to me to give to him.

"'Q. What did Giuliano say to you, if anything? A. As I recall, he said "Thank you" and left.

"'Q. Now, then, on the second occasion which you have told us about when Rigo gave you $2,000 in an envelope, did he also give you a second envelope on that occasion? A. That's right, sir.

"'Q. Once again were these two envelopes indistinguishable one from the other? A. Yes, sir.

"'Q. Once again, do you know whether you ultimately opened the one which he told you was for you or the one which he told you was for Giuliano? A. I don't recall.

"'Q. But the one you did open, one of the envelopes, there was $2,000 in cash? A. Yes.

"'Q. Approximately. A. That is correct.

"(3054a) 'Q. What did you do with the second envelope? A. I followed the same procedure. I called him and said I would like to see him.

"'Q. Called who? A. Mr. Giuliano. He came over and I gave it to him and practically the same conversation, "Paul Rigo asked me to give you this and I am presenting it to you." "Thank you." And that was the end of the conversation.

"'Q. Did you ever discuss these transactions with Giuliano afterwards? A. Never, sir.

"'Q. Why didn't you? A. I did wrong and I just didn't want to talk about it.

"'Q. Was it a kind of silent partnership? A. No. It wasn't a partnership in any sense of the word. It was just a shame in my own life, that's all, and I just didn't want to talk about it, and that was the end of the conversations with him at that time.

"'Q. But you were acting in concert with him in this regard? A. I gave it to him; then I must have been.'"

On cross, Rigo testified that he paid "that money" to "Mr. Gordon, Mr. Schiff, Mr. Bernstein, and Mr. Frank Addonizio" on February 15, 1968 (R3550a, 3551a, 3552a).

He further testified (R3863a to 3865a):

"Q. • • • I think you know Mr. Gordon? A. Yes, sir.

"Q. You knew him when he was a councilman and when he was corporation counsel, did you not, sir? A. Yes, sir.

"Q. You testified, Mr. Rigo, that in April or March of 1968 I believe it was, Mr. Gordon and his son, Leo, accompanied you to a flight to Nassau, correct? A. I don't recall the dates, but he did, sir.

"(3864a) Q. And you paid for the tickets? A. Yes, sir.

"Q. For both Mr. Gordon and his boy? A. Yes, sir.

"Q. Did Mr. Gordon ask you to pay them? A. He asked to go on the trip, sir. • • •

"Q. You attended his swearing in as corporation counsel, did you not, Mr. Rigo? A. Yes, sir, I did.

"(3865a) Q. And on that occasion, sir, didn't you present him with a fairly expensive office chair? A. I don't believe it was on that occasion. I did do that, though I think it was later.

"Q. It was after he had been appointed corporation counsel? A. Yes, sir.

"Q. Mr. Rigo, Mr. Gordon didn't solicit that chair from you, did he, sir? A. No, sir.

"Q. You volunteered that gift? A. I sent it to him, sir."

And (R3868a to 3870a):

"Q. Would you refer to G-48, your diary. Do you have it there? A. Yes, sir.

"Q. Let's kind of get to the page that comes in around Christmas Day, December 25. A. Yes, sir.

"Q. There is only one notation on that page, isn't there? A. Yes, sir.

"Q. December 23. (3869a) A. Yes, sir.

"Q. P + 1. G + 1. B + 1 and T + 1.' A. Yes,

"Q. You told us on your direct examination that was a payoff? A. Yes, sir.

"Q. And G (Gordon) is my client? A. Yes, sir.

"Q. That thousand that you gave him, would that have been for any assistance he rendered you in securing that loan in December of 1968 some six days earlier? A. No, sir, this was supposed to be part of the $10,000.

"Q. And this is the same time that you were submitting records to the Essex County Grand Jury investigating these projects? A. I don't think we were submitting them directly.' I think we were giving records to the City of Newark which they couldn't find in their archives.

"Q. Which they in turn were submitting? A. That was my understanding, sir. I can't recall us giving anything directly to the Essex County Grand Jury at that time.

"Q. It didn't trouble you to make the payoff while the Essex County Grand Jury was investigating? (3870a) A. It troubled me, sir."

The jury at the trial below found Gordon guilty and he was convicted on counts 1 through 64, inclusive. The Third Circuit affirmed.* See Judgment appended hereto.

A petition for rehearing was filed with the Clerk of the Third Circuit on or before October 7, 1971, and was denied November 3, 1971.

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* Gordon was disbarred pending the appeal to the Third Circuit. *In re Gordon*, 58 N. J. 386 (1971). Please read same.

Reasons Why Certiorari Should Be Allowed

(Italics ours unless otherwise noted.)

ARGUMENT

POINT ONE

The decision of the court below is, in principle in conflict with decisions of other courts of appeals on the question of the sufficiency of evidence, in a prosecution under the Hobbs Act for conspiracy to extort, to prove knowledge on the part of an accused thereunder that money was to be obtained by the wrongful use of fear.

There was *no* evidence whatever at the trial below affording a legitimate inference that Gordon *knew* that money was to be obtained by him or anyone else from anyone by the wrongful use of fear, i.e., by *extortion.* The Hobbs Act is directed at the protection of interstate commerce against injury from extortion. *United States* v. *Green,* 350 U. S. 415 (1956).

"Ordinarily one is not guilty of a crime unless he is aware of the existence of *all* those facts which make his conduct criminal." *United States* v. *Crimmins,* 123 F. 2d 271, 272 (2d Cir. 1941); *United States* v. *Byrd,* 352 Id. 570 (2d Cir. 1965). To convict of conspiracy "there must be proof of an unlawful agreement and participation therein with knowledge of the agreement." *Pelz* v. *United States,* 54 Id. 1001, 1005 (2nd Cir. 1932). The facts charged and proved must bring the defendant *plainly* within the criminal statute. *Farmer* v. *United States,* 128 F. 2d 970 (10th Cir. 1942). The Government must prove that the defendant had in contemplation *all* the elements of the crime he is charged with conspiracy to commit.

United States v. *Keegan,* 141 Id. 248 (2nd Cir. 1944), reversed on another ground 325 U. S. 478 (1945). See, also, *Hardy* v. *United States,* 269 F. 134, 135 (5th Cir. 1920), cert. den. 256 U. S. 689. "Guilt is established when an organization with such criminal purposes is shown to have existed and defendants are shown to have joined it with knowledge of such *purposes.*" *Frankfeld* v. *United States,* 198 F. 2d 679, 689 (4th Cir. 1952), cert. den. 344 U. S. 922. One who has no knowledge of the object of a conspiracy cannot be a conspirator for the intent to participate is lacking. *Stanley* v. *United States,* 245 F. 2d 427 (6th Cir. 1957).

"Those having no knowledge of the conspiracy are not conspirators, * * *." *United States* v. *Falcone,* 311 U. S. 205, 210 (1940). "There must * * * be *proof* of the unlawful agreement and participation therein, with knowledge of the agreement." *Dahly* v. *United States,* 50 F. 2d 37, 43 (8th Cir. 1931).

"There need not be proof that the conspirators were aware of the criminality of their objective, but knowledge of the commission of the substantive offense must be *brought home to them* to supply the essential ingredient of intent. *Ingram* v. *United States,* 360 U. S. 672, 678 * * * (1959)." *United States* v. *Zuidewald,* 316 F. 2d 873, 878 (7th Cir. 1963), cert. den. 376 U. S. 916.

It is not enough for the defendant to know that *some* criminal purpose must be involved as the purpose of his participation. *United States* v. *Gallishaw,* 428 F. 2d 760, 764 (2d Cir. 1970). Indeed, in *United States* v. *Bruno,* 153 F. 2d 843, 845 (3d Cir. 1946), reversed 329 U. S. 207 (1946), the Third Circuit says:

> "This bit of testimony, it may be granted was suspicion creative. But concerning what does it create

> suspicion? * * * It may * * * tend to show that he (Bruno) was wrongfully taking money from the concern by whom he was employed. But he was not being prosecuted for that."

There is absolutely no evidence in this case that Gordon knew that anyone's consent to paying money to any of the defendants was, or was to be, induced by fear of financial injury. Certainly, the Government didn't prove that, when Gordon obtained money from Rigo, Rigo's payment to Gordon was induced by fear of any kind, engendered by Gordon or by *Giuliano*. There was no proof that Gordon knew that any money paid by Rigo to any of the official defendants was, or was to be, unwillingly paid by Rigo. Certainly, there was no proof that Gordon would or did receive money from Rigo because of exertion by Gordon of illegal compulsion upon or oppressive exaction from Rigo. See point Two, *infra*. "Evidence that" Gordon's taking of money from Rigo "could have been in furtherance of a plan" to induce Rigo to pay money because of fear of financial injury, "if" Gordon "had known of such plan, is not evidence that" he "did know" that plan. See *Ingram* v. *United States*, 360 U. S. 672, 680 (1959).

To convict Gordon of conspiracy to extort from Rigo, the Government was required at the very least to show that Gordon knew that extortion was, or was to be, practiced upon Rigo, see *United States* v. *Gallishaw, supra*, at page 763 of 428 F. 2d, since extortion is an essential element of the conspiracy here charged.

It is not enough to show that some of Gordon's co-defendants knew of the purpose of the conspiracy as to extortion. The Government was required and failed to

prove that *Gordon,* individually, knew that purpose. The conviction of each individual defendant of conspiracy must stand or fall according to the strength or weakness of the case against such defendant without regard to what the jury may have done in the case of other alleged conspirators. *United States* v. *Johnson,* 165 F. 2d 42 (3rd Cir. 1947), cert. den. 332 U. S. 852. The use of circumstantial evidence to support a conviction does not relieve the prosecution from showing *some* knowledge, explicit or implied, in *each* defendant of the principal purpose of the conspiracy. *Miller* v. *United States,* 382 F. 2d 583, 586 (9th Cir. 1967). There was not even hearsay evidence, whether in the form of co-conspirators' declarations or otherwise, that Gordon knew anything about a conspiracy to affect interstate commerce by *extortion.*

However, the Court below, in its opinion (appendix hereto, page 3a, line 12, to page 4a, line 30), says:

> "The question, then, is whether the evidence supports the jury's conclusion that Gordon had knowledge of the essential nature of the conspiracy. Paul Rigo, a victim of the plot, testified as to co-defendant *Boiardo's* extortion demands:
>
> '"You pay me the 10%." He said, "I take care of the Mayor. I take care of the Council. I take care of anybody else that has to be taken care of down there."'
>
> "Rigo further testified that when he went to see the Mayor because of his difficulty in getting paid, the *Mayor* told him:
>
> "'• • • that this was a matter that was really bound in to the Council which had to approve the funds, and set up a bond issue and so forth and

that this wasn't moving. He realized that, but Boiardo would have to move it and why didn't I go see him.'

"When a state commission began to investigate the city, a co-defendant *LaMorte* explained to Rigo that the officials would have to be paid off directly. • • •

"• • • In order to agree to an object of a conspiracy, the conspirator must have knowledge of that objective, but such knowledge may be inferred from the circumstances. See United States v. Gallishaw, 428 F. 2d 760, 763 (2d Cir. 1970). The circumstances here, including Gordon's own admismissions, his acceptance of the money from Rigo for himself and Giuliano, and his position on the City Council, *the very body instrumental in causing Rigo fear of financial injury,* permit such inference."

The italicized finding in the above quotation was, we submit, clear error as a finding under the state of the evidence at the trial. The finding, in effect, was this: The City Council *was* instrumental in causing Rigo fear of financial injury. There was no evidence whatever that it *did* so. It is true that the City Council was, by its very nature, capable of preventing the receipt or collection of money by the subject contractor under its contract with the city. It was, therefore, in a *position* to cause in Rigo fear of financial injury. But that fact by no means permits, much less authorizes, a legitimate inference that it did cause fear of financial injury in Rigo. Its mere existence could have motivated Rigo to make *voluntary* payments to members of the Council in the hope, expectation or even assurance that such members would act

favorably upon any financial decision it could make as respects the contractor.

The mere fact that Gordon admitted that the monies received by him from Rigo were in *connection* with the Water Authority contracts, does not prove that he knew that *his* expected favorable vote, together with that of any or all of the other members of the Council was, or would be, and was intended to be, the means of causing Rigo fear of financial injury, rather than the means, equally inferable by this Court, of receiving payment offered for favorable action by the members of the Council.

It is not enough that Gordon, by reason of his membership on the Council, *might* have known, or *should* have known, that the Council was exerting, or intended to exert, financial extortion upon the contractor through Rigo. In order to convict Gordon, it was necessary to prove that he *must* have known that such was the case. *Wolf* v. *United States,* 238 F. 902, 905-906 (4th Cir. 1916). There was no such proof, either by direct evidence or even validly inferentially, from any probative source. The hearsay testimony of Rigo was not, in such connection, of probative value.

"Without the knowledge, the intent cannot exist. * * * Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. * * * This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive offenses." *Direct Sales Co.* v. *U. S.,* 319 U. S. 703, 711 (1943); *Ingram* v. *United States,* 360 U. S. 672, 680 (1959). Proof of agreement to enter into a conspiracy is not to be lightly inferred. *nited States* v. *Johnson,* 439 F. 2d 885 (5th Cir. 1971).

But, says the court below in its opinion (appended hereto, page 4a, lines 14 to 18):

> "Once the existence of a conspiracy has been established, only 'slight evidence' is necessary to support a jury verdict that an individual was a member of the conspiracy. United States v. Weber, 437 F. 2d 327, 333 (3d Cir. 1970). The evidence against Gordon is sufficient to meet that test."

However, the "slight evidence" in *United States* v. *Weber,* 437 F. 2d 327 (3d Cir. 1970), was introduced and recited in the opinion of the court as follows, at pages 336 and 337 of 437 F. 2d:

> "When the co-conspirator declarant is available as a witness, there is no doubt that hearsay principles do not prevent the introduction into evidence of extra-judicial statements made by the co-conspirator in furtherance of the conspiracy. * * * As a matter of hearsay principles, if the co-conspirator exception is applicable when the declarant is alive, it follows that the extra-judicial statements of a dead co-conspirator are also admissible.

> "As to Weber's second objection regarding the statements of the deceased witness, there was *ample* evidence, *putting aside the hearsay itself, as we must,* Glasser v. United States, 315 U. S. 60, 74-75 * * * (1942), from which a jury could find the existence of a conspiracy involving Burgess and Weber. * * *

> "At trial there was clear evidence of a conspiracy between Price and Burgess. (337) * * * The evidence connecting Weber to the Price-Burgess conspiracy was *sufficient* to justify the jury's decision that Weber participated in that conspiracy. That

> evidence included such overt acts as Weber's telephone call to Giles, *demanding* that Colonial give a contract to Price Company; Weber's conversation with Price in which Weber said he *wanted* Price Company to *win* the Colonial contract; and Weber's meetings in New Jersey with Burgess."

Now, in the case at bar, let us put aside the hearsay evidence against Gordon. There was not one iota of evidence that any of the councilmen, including Gordon, personally exerted fear in Rigo of financial injury, or knew that such fear was or was to be exerted. All we have is that Rigo testified that the Mayor, LaMorte and Boiardo told him that he would suffer financial injury unless he made payments to the councilmen so that the matter would move through the council. Nothing is left but suspicion, and that, however strong, is not enough for conviction on the conspiracy count, much less on the multitude of substantive counts for extortions which did not involve Gordon at all. If the evidence in the *Weber* case, *supra*, was slight, then the evidence at bar, minus the hearsay, was, by comparison, not even slight, but a bare scintilla, if that.

POINT TWO

The court below has decided an important question of federal law, viz., that it is immaterial, under the Hobbs Act, whether one who has obtained money from another, with his *consent*, has himself induced fear of financial injury in such other person, so long as the former utilized such fear, even if it was induced by a third person or persons without the knowledge of the one obtaining the money.

In its opinion (appended hereto, page 5a, lines 8 to 21), the court below says:

> "The judgment of conviction on the substantive counts must also be affirmed. Pinkerton v. United States, 328 U. S. 640 (1946) teaches that *party* to a continuing conspiracy may be held responsible for substantive offenses committed by *co-conspirators* in furtherance of the conspiracy, even though he neither participated nor had knowledge of them. Id. at 645-48. And with regard to twelve of the substantive counts, it was actually proved that Gordon received money from Rigo because of the fear of financial injury which *the conspirators* induced in Rigo. Whether such fear was produced by Gordon or one of the others is immaterial so long as Gordon utilized it to extort money wrongfully from Rigo. Callanan v. United States, 223 F. 2d 171 (8th Cir.), cert. denied, 350 U. S. 862 (1955)."

The case of *Pinkerton* v. *United States*, 328 U. S. 640 (1946), just doesn't apply. In that case, there was sufficient evidence to implicate the particular defendant in the conspiracy. 328 U. S. at page 645, top. Here, there wasn't. See Point One *supra*. The combination of minds in an un-

lawful purpose is the foundation of the offense, and a party who did not join in the previous conspiracy cannot be convicted on another's overt act. See *United States* v. *Hirsch*, 100 U. S. 33, 34, bottom (1879).

Nor did *Callanan* v. *United States*, 223 F. 2d 171 (8th Cir. 1955), cert. den. 350 U. S. 862 (1955), hold that it would be immaterial whether fear of financial injury was produced by the accused or by someone else. The court there says, on page 175 of 223 F. 2d:

> "It appears to us that the offense of extortion under the Hobbs Act has been committed if the *defendants* have illegally created fear in their victim, which fear has induced the victim to part with his money and property. • • • If fear was created in the victim's mind, if such fear was a reasonable one, and if the *defendants* by making use of *that* fear extorted money or property, the foundation for guilt is established."

That's more like it. We are here referring to the substantive offese of extortion, where no conspiracy has been established. In this case, there is no proof that *Gordon* created fear in Rigo. If, in accepting money from Rigo, Gordon was making use of fear produced in Rigo by someone else, there was no proof that Gordon knew that anyone had produced fear in Rigo. Gordon therefore could not be guilty of extortion because he had never conspired to extort money from Rigo and therefore could not be bound by the unknown—to him—creation of fear in Rigo by someone else.

This Court should not sanction the infliction of a vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by

a co-partner in the course of the firm's business, especially where, as here, no partnership has been proved. "Such analogies from private commercial law and the law of torts are dangerous • • • for transfer to the criminal field. • • • Guilt there with us remains personal, not vicarious, for the most serious offenses. It should be kept so." Dissenting opinion of Rutledge, J., in *Pinkerton* v. *United States, supra,* at page 651 of 328 U. S.

As stated by the court in *United States* v. *Harned,* 43 F. 376 (D. Wash. 1890):

> "• • • The defendant is brought to the bar to answer the charges in this indictment, and nothing else. He cannot be convicted here on general principles, or for any sort of wrongdoing except the crime of extortion."

In *Pettibone* v. *United States,* 148 U. S. 197, 209-210 (1893), the court says:

> "The defendants could neither be indicted nor convicted of a (210) crime against the State, • • • but their offence against the United States consisted entirely in the violation of the statute of the United States • • • If they were not guilty of that, they could not be convicted. And neither the indictment nor the case can be helped out by reference to the alleged crime against the State, and the defendants be punished for the latter under the guise of a proceeding to punish them for an offence which they did not commit."

"Under our system of justice it is not enough that evidence in a criminal case might support a finding of unethical conduct or of some violation of some law. It is essential that there be evidence from which a jury could

have found the defendant guilty beyond reasonable doubt of the particular offense against the federal criminal law with which defendant has been charged." *United States* v. *Swarthout,* 420 F. 2d 831, 833 (6th Cir. 1970).

POINT THREE

The decision of the court below has sanctioned the erroneous refusal by the trial court to charge, on request, the distinction between extortion and bribery, which decision by the court below is in conflict with decisions of other courts of appeals.

Defendants, other than Gordon, submitted written requests to charge the jury to the following effect: that bribery and extortion are distinct and mutually exclusive crimes; that bribery amounted to the voluntary payment of money; that extortion amounted to a coerced payment of money; that a conviction of the defendant would have to be grounded upon a belief, beyond reasonable doubt, that they had committed extortion (as opposed to bribery); and that a finding that defendants had accepted bribes would not justify a conviction (R532a, 541a to 542a). Defendant, Gordon, by a written request to charge (Supplemental Appendix 3a) and by oral request (R5366a) joined in the requests to charge submitted on behalf of the other defendants. Although counsel strenuously urged the trial judge to instruct the jury on the distinction between bribery and extortion (R5375a to 5380a, 5705a to 5705a), he refused to do so (R5396a).

The trial judge charged the jury on the elements of extortion, adding the statement that: "The mere voluntary payments of money unaccompanied by any any (sic) economic loss, would not constitute extortion • • •"

(R5747a to 5749a). However, he did not mention the word bribery, or that bribery and extortion were mutually exclusive crimes, or that a finding that defendants had taken bribes would not justify a conviction. At the conclusion of his charge, defendants, Gordon included, took exception to the above-quoted aspects of his instructions (R5782a to 5783a, 5790a).

The court below found that above point as a refusal to charge to be without merit, without discussion. (Opinion, appended hereto, page 5a, lines 24 to 27.)

"(T)he respondents in a criminal case, no less than the parties in a civil case, are entitled of right to have clearly stated to the jury each distinct and important theory of defense, so that the jury may understand that theory and the essential rules applicable to it." *Hendrey* v. *United States,* 233 F. 5, 18 (6th Cir. 1916). "Where the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory. *Bird* v. *United States,* 180 U. S. 356, 361 • • •." *Calderon* v. *United States,* 279 F. 556, 558 (5th Cir. 1922). "While some reliance may be placed by a trial judge upon the capacity of a jury to understand the implications of instructions, nevertheless both of the parties to the cause are entitled to have the jury clearly informed on the whole of the instructions as to the law covering their respective theories of the case, there being evidence to support each theory." *McAffee* v. *United States,* 105 F. 2d 21, 26 (App. D. C. 1939).

A defendant is not disentitled "to an instruction embodying a theory merely because it is predicated upon proof adduced by the government • • •." *United States* v. *Phillips,* 217 F. 2d 435, 441 (7th Cir. 1955). And in *United States* v. *Clancy,* 276 F. 2d 617, 636 (7th Cir.

1960), reversed on another ground 365 U. S. 312 (1961), the Seventh Circuit says:

> "True, defendants were entitled to instructions on their theory of the case for which there was any foundation in the evidence, even though they did present any testimony."

CONCLUSION

It is therefore respectfully urged that this petition for writ of certiorari be granted.

Respectfully submitted,

SIMON, DENSTMAN & NOONAN,
Attorneys for Petitioner,
By: JOHN W. NOONAN,
A Member of the Firm.

SAM WEISS,
Of Counsel.

APPENDIX A

Opinion of the U. S. Court of Appeals

(Filed—September 23, 1971.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1163

UNITED STATES OF AMERICA

v.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILIP GORDON, BENJAMIN KRUSH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER

PHILIP GORDON,

Appellani.

(D. C. Criminal No. 548-69)

Appendix A

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued June 10, 1971

Before STALEY and ADAMS, *Circuit Judges*
and GARTH, *District Judge*

PER CURIAM:

We are being asked here to reverse the conviction of defendant, Philip Gordon for extortion and conspiracy to commit extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, on the grounds, *inter alia,* that the Government failed to prove that Gordon had knowledge of any conspiracy affecting interstate commerce or obtaining money by the wrongful use of fear or under color of official right, and that the Government failed to prove that Gordon obtained money by inducing fear of financial injury or under color of official right.

Gordon was a member of the City Council of Newark, New Jersey. He was tried as a co-defendant along with the Mayor, Councilmen, high city officials and others. The evidence produced at the trial proved a well organized conspiracy to extract money from contractors, suppliers and engineers engaged in public work projects for the city. In particular, the facts surrounding the construction of the Southside Interceptor Sewer project and the Southerly Extension of Newark's water supply formed the focus of the evidence produced at the trial. The facts demonstrated that the scheme had functioned according to plan for many years. A more complete recitation of the

background and history of the conspiracy can be found in United States v. Addonizio, F. 2d No. 19,295, (3d Cir. 1971).

There is no doubt that the testimony supports a finding by the jury that a conspiracy did in fact exist. The record describes in detail the organization and infrastructure of the conspiracy, including the public officials who controlled the award of and payment for public works projects, the solicitors and collectors of the extorted money, and the means by which checks could be converted into cash to facilitate the extortionate payments.

The question, then, is whether the evidence supports the jury's conclusion that Gordon had knowledge of the essential nature of the conspiracy. Paul Rigo, a victim of the plot, testified as to co-defendant Boiardo's extortion demands:

> "'You pay me the 10%,' He said, 'I take care of the Mayor. I take care of the Council. I take care of anybody else that has to be taken care of down there."

Rigo further testified that when he went to see the Mayor because of his difficulty in getting paid, the Mayor told him:

> ". . . that this was a matter that was really bound into the Council which had to approve the funds, and set up a bond issue and so forth and that this wasn't moving. He realized that, but Boiardo would have to move it and why didn't I go see him."

When a state commission began to investigate the city, co-defendant LaMorte explained to Rigo that officials would

have to be paid off directly. Thereafter, Gordon took money several times from Rigo, not only for himself, but for Councilman Guiliano as well. This fact was established by Rigo's testimony and corroborated by Gordon's grand jury testimony introduced at the trial without objection, and Gordon's diary entries.

Gordon testified that Rigo would give him two unmarked envelopes, one of which was for Guiliano. After opening one and finding $2,000, he invited Guiliano to his office, but didn't say why "because I didn't feel it was a subject of a telephone conversation." Gordon knew that taking the money was wrong, and did not report it on his income tax returns because "it was illegal moneys."

Once the existence of a conspiracy has been established, only "slight evidence" is necessary to support a jury verdict that an individual was a member of the conspiracy. United States v. Weber, 437 F. 2d 327, 336 (3d Cir. 1970). The evidence against Gordon is sufficient to meet that test.

Gordon argues nevertheless that the Government failed to prove that he had knowledge regarding the extortionate purpose of the conspiracy. In order to agree to an object of a conspiracy, the conspirator must have knowledge of that objective, but such knowledge may be inferred from the circumstances. *See* United States v. Gallishaw, 428 F. 2d 760, 763 (2d Cir. 1970). The circumstances here, including Gordon's own admissions, his acceptance of the money from Rigo for himself and Guiliano, and his position on the City Council, the very body instrumental in causing Rigo fear of financial injury, permit such inference. Similarly, Gordon, as an attorney and Councilman who voted on the contracts, plans and associated appropriations could not help knowing that the

projects and the construction firms involved were closely connected with interstate commerce. All that need be shown is that "the defendants conspired to commit extortion, and that the natural effect of carrying out their threat, whether they were conscious of it or not, would affect commerce." United States v. Pranno, 385 F. 2d 387, 389-90 (7th Cir.) *cert. denied,* 390 U.S. 944 (1968).

The judgment of conviction on the substantive counts must also be affirmed. Pinkerton v. United States, 328 U. S. 646 (1946), teaches that a party to a continuing conspiracy may be held responsible for substantive offenses committed by co-conspirators in furtherance of the conspiracy, even though he neither participated nor had knowledge of them. *Id.* at 645-48. And with regard to twelve of the substantive counts, it was actually proved that Gordon received money from Rigo because of the fear of financial injury which the conspirators induced in Rigo. Whether such fear was produced by Gordon or one of the others is immaterial so long as Gordon utilized it to extort money wrongfully from Rigo. Callanan v. United States, 223 F. 2d 171 (8th Cir.), *cert. denied,* 350 U.S. 862 (1955).

We conclude, therefore, that the evidence produced by the Government in this case is sufficient to support the judgments of conviction. We have carefully considered each of the additional issues raised by Gordon and after a thorough review of the record, find them to be without merit. United States v. Addonizio, —— F. 2d, —— No. 19,925 (3d Cir. 1971).

One final matter does merit comment. Gordon alleges he was denied a fair trial because the Government led him to believe that by foregoing a defense he would be allowed to sever his trial from that of his co-defendants, and

would receive other consideration as well. Gordon's counsel frankly admits that there is no direct evidence of that arrangement in the record, but has represented to this Court that such an agreement was consummated with the Government, albeit, *dehors* the record. The United States Attorney, on the other hand, categorically denies making any such promises or representations to Gordon's counsel. This matter, however, is not properly before us. It is "Hornbook law" that a Court of Appeals may consider only facts of record, and it is the record alone which controls the facts. Duran v. United States, 413 F. 2d 596, 605 (9th Cir.), *cert. denied*, 396 U.S. 917 (1969); *accord*, United States v. Hedburg, 411 F. 2d 657 (9th Cir. 1969); Tanner v. United States, 401 F. 2d 281, 288 (8th Cir. 1968), *cert. denied*, 393 U.S. 1109 (1969); *Brookins* v. United States, 397 F. 2d 261, 262 (5th Cir.), *cert. denied sub nom*, Houston v. United States, 393 U.S. 952 (1968); United States v. Brawer, 207 F. 2d 111 (3d Cir. 1953); United States ex rel. Collins v. Ashe, 176 F. 2d 606, 607 (3d Cir. 1949); *see* Sleek v. J. C. Penney Co., 324 F. 2d 467 (3d Cir. 1963); Drake v. General Finance Corporation of Louisianna, 119 F. 2d 588 (5th Cir. 1941); United States v. Bono, 113 F. 2d 724, 725 (2d Cir. 1940). *See also*, Thomson v. Gaskill, 315 U.S. 442 (1942). Accordingly, this Court is constrained not to consider matters *dehors* the record.[1]

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

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[1] In *Brawer*, this Court indicated that a motion under 28 U.S.C. §2255 would provide a vehicle for proving the existence of any violations of fundamental rights which were *dehors* the record in a criminal trial.

APPENDIX B

Judgment of the U. S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1163

UNITED STATES OF AMERICA

vs.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER

PHILIP GORDON,

Appellant.

(D. C. Criminal No. 548-69)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ——— DISTRICT OF NEW JERSEY

Present: STALEY and ADAMS, *Circuit Judges* and GARTH, *District Judge*

Appendix B

This cause came on to be heard on the record from the United States Court for the ——— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 27, 1971, be, and the same is hereby affirmed.

ATTEST:

THOMAS R. QUINN
Clerk

September 23, 1971